

**THE REPUBLIC OF UGANDA**

**THE CONSTITUTIONAL COURT OF UGANDA**

5

**CONSTITUTIONAL PETITION NO.15 OF 2006**

10 1. CAROLINE TURYTEMBA  
2. ALLEN ELWANA OKIROR  
3. OGWANG RICHARD  
4. EPHRAIM BYAMUKAMA  
5. BARHAM BANYENZAKI

..... PETITIONERS

15

**VERSUS**

1. THE ATTORNEY GENERAL  
2. UGANDA LAND COMMISSION .....RESPONDENTS

20 CORAM: HON. LADY JUSTICE A.E.N. MPAGI BAHIGEINE, DCJ  
HON. LADY JUSTICE C.K. BYAMUGISHA, JA  
HON. MR. JUSTICE S.B.K. KAVUMA, JA  
HON. MR. JUSTICE A.S. NSHIMYE, JA  
HON. MR. JUSTICE REMMY KASULE, JA

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**JUDGEMENT OF THE COURT.**

***Introduction:***

30 The petitioners instituted this constitutional petition against both respondents pursuant to Article 137 of the Constitution, and The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992.

Each of the petitioners is a parishioner of All Saints Cathedral, Church of Uganda. The petitioners bring the petition on their own and also on behalf of the parishioners of All Saints Cathedral parish.

35 The petitioners assert that the acts of the respondents of allocating and granting ownership of particular lands, in the neighbourhood of All Saints Cathedral to third parties, to the exclusion of

the petitioners, infringe some of their fundamental human rights in contravention of the Constitution. They thus seek remedies by reason thereof.

40 The lands, the subject of the petition, are first, the land comprised in plots 7-9 Lugard Road, and plot 2 Akii Bua Road, Nakasero, Kampala City, referred to as the **“UBC Land”**, previously occupied and used by Uganda Broadcasting Corporation (UBC) of Ministry of Information, Uganda Government. Second: the Land referred to in the petition as **“Mutineer Valley Park”**, now, developed with residential apartments. Third: the Land comprised in plot 4 Lugard Road,  
45 Kampala City, now allocated to and owned by one William Nkemba. The said lands shall be referred to in this Judgment as the **“UBC Land”**, **“Mutineer Valley Park”** and **“Nkemba Plot”** respectively. They shall also be collectively described as the **“suit lands”**.

The petitioners contend that as early as August 2001, the Church of Uganda, to which the All  
50 Saints Cathedral parish belongs, approached the Government of Uganda requesting for securing more lands bordering and neighbouring land currently occupied by All Saints Cathedral, Nakasero. The Government gave no positive response to the request. The church was, in fact, informed that, for historical reasons, the Mutineer Valley Park land was unavailable.

55 Later, the petitioners learnt that the UBC land had been allocated to AYA INVESTMENTS (U) LIMITED, a company incorporated on 25.01.06, Mutineer Valley Park to one **“AMINA”** and the Nkemba plot to a Mr. William Nkemba, all private developers.

The above allocations, according to the petitioners, were done without any consideration of the  
60 long standing, demonstrated and urgent interests of the Church of Uganda in the said lands.

The petitioners contend that, the allocation of the said suit lands, without consideration of the interests of All Saints Cathedral parish, amounted to discrimination of the petitioners and other

parishioners of All Saints Cathedral parish, in violation of Article 21 of the Constitution, which  
65 guarantees equality in all spheres of political, economic, social and cultural life.

Further, by denying the Church of Uganda the opportunity to acquire further land, the  
respondents denied the petitioners and other All Saints Cathedral parishioners, the freedom to  
practice their religion, contrary to the constitutional right to practice, profess, maintain and  
70 promote their religion.

By reason of the above, the petitioners prayed this court for declarations that:

- (i) the allocation of the suit lands to other allocatees, other than the Church of Uganda,  
was discriminatory and therefore inconsistent with Article 21(1) and (2) of the  
75 constitution,
- (ii) the change of user of the suit lands by the respondents, breached the petitioners' rights  
to practice, manifest, enjoy, profess, maintain and promote their religion and was  
therefore inconsistent with Articles 29(1) (c) and 37 of the constitution,
- (iii) the maintenance of the fencing off of road reserves of Akii Bua Road and Kyaggwe  
80 Road and the blockage of Kyaggwe Road, which are part of the suit lands, was  
discriminatory of the petitioners and other fellow parishioners of All Saints Cathedral  
parish. The act also breached their rights to practice, manifest, enjoy, profess,  
maintain and promote their religion, thus being inconsistent with Articles 21(1) and  
(2), 29(1) (c) and 37 of the constitution.

85 The petitioners also prayed for orders that:

- (i) the leases and certificates of title issued to the allocatee of each of the suit lands be  
cancelled.
- (ii) the allocation and lease process regarding each of the suit lands be undertaken de  
novo in a manner strictly consistent with the constitution.
- 90 (iii) the fencing off of the suit lands comprising the road reserves of Akii Bua Road and  
Kyaggwe Road and the blockades along Kyaggwe Road be reversed.

The respondents deny the petitioners allegations. They aver that the allocation of the suit lands to the respective third parties and the fencing off of public areas in the suit lands, did not contravene Articles 21(1)(2), 29(1) (c) and 37 of the constitution. The change of user of any of  
95 the suit lands was also not in contravention of the constitution.

To the respondents, the petitioners did not and do not have any legal and enforceable interest in the suit lands.

100 The respondents also further contended that the petition was incompetent, because its supporting affidavit was incurably defective and also the petition sought orders that affected the rights of third parties, who were not parties to the petition.

***Representation:***

105 At the hearing of the petition, the petitioners were represented by learned counsel Andrew Kibaya of Messrs Shonubi, Musoke & Co, Advocates, while learned State Attorney Gantungo Daniel of the Attorney General's Chambers, represented both respondents.

***The issues:***

110 The following issues were framed for due determination:

1. **Whether or not, the affidavit of the second petitioner, Allen Elwana Okiror, filed in support of the petition, is incurably defective and ought to be struck out.**
2. **Whether or not, the petition is incompetent in as far as it seeks orders and declarations against persons who are not parties to the petition.**
- 115 3. **Whether or not, the allocation of “*the suit lands*” to other third parties, other than the Church of Uganda, to which All Saints Cathedral parish belongs, breached the petitioners’ right to practice, manifest, enjoy, profess, maintain and promote the**

**petitioners' religion as parishioners of All Saints Cathedral parish, and therefore was inconsistent with Article 37 of the Constitution of Uganda.**

- 120      **4. Whether or not, the allocation, change of user and grant of leases of the suit lands to third parties, other than the Church of Uganda, was discriminatory and thus inconsistent with Article 21(1) and (2) of the Constitution of Uganda.**
- 5. Whether or not the petitioners are entitled to the remedies sought in the petition.**

*The case for the Petitioners:*

125      ***Issue No.1:***

The petitioners maintained that the affidavit of the second petitioner, Allen Elwana Okiror, in support of the petition, was not defective. The petition was thus not in any way defective and/or incompetent.

***Issue No.2***

130      Petitioners submitted that the petition disclosed issues for constitutional interpretation between the petitioners and the respondents, as it set out the acts and/or omissions complained of, pointed out the provisions of the constitution stated to have been breached, and then sought remedies of declarations and orders. It was immaterial that the allocatees of the various suit lands were not parties to the petition.

135      ***Issue No.3:***

In respect of this issue, the petitioners asserted that, the respective acts of allocation, change of user and grant of leases to other third parties of the suit lands, violated their constitutional right to practice and manifest their religion contrary to Article 29(1) of the Constitution. Further, their right to belong, enjoy, practice, profess, maintain and  
140      promote their religion in community with others was also violated contrary to Article 37 of the Constitution.

The contravention of Articles 21, 29 and 37 of the Constitution by the respondents, to the prejudice of the petitioners, as parishioners of All Saints Cathedral parish, was constituted by the following acts:

- 145 (i) The Church of Uganda had expressly demonstrated interest to acquire the suit  
lands, or part of it, for development purposes. Yet the church's applications for  
the said lands had not been responded to by the respondents, and thus, the church  
had been deprived of the option to acquire and develop the said lands.
- 150 (ii) The suit lands had subsequently been allocated by the respondents to third parties,  
without the church being involved in the process, or being consulted, or being  
given the opportunity to acquire the same or part thereof.
- 155 (iii) The parishioners of All Saints Cathedral parish used the area of the suit lands for  
parking motor-vehicles near State House. The respondents subsequently fenced  
off this land, so that, the parishioners were no longer able to use it for parking  
purposes. This resulted in the parishioners not having sufficient area where to  
park when professing their religion at All saints Cathedral parish. This was in  
contravention of the Constitution.
- 160 (iv) The change of user of the suit lands, without taking into account, the long  
standing interests of the Church in the said lands, was contrary to the  
Constitution.

The above respondents' acts denied and curtailed the petitioners and other parishioners of All Saints Cathedral parish, their rights to enjoy, practice, profess, maintain and promote their religion contrary to Articles 29(1) (c) and 37 of the Constitution.

165 ***Issue No.4:***

The petitioners contended as regards this issue, that when the respondents allocated the suit lands to the third parties, to the exclusion of Church of Uganda, this amounted to discrimination against the petitioners and parishioners of All Saints Cathedral parish. The respondents acted so without any consultation or involving the Church of Uganda. This was contrary to Article 21(1) and (3) of the Constitution that provides that all persons are equal before the law in the spheres of political, economic, social and cultural life.

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The petitioners' counsel thus prayed that the petition be allowed, and the petitioners be granted the remedies prayed for.

175 ***The case for the respondents:***

***Issue No.1:***

180 The respondents submitted that the affidavit of the 2<sup>nd</sup> petitioner, Allen Elwana Okiror, was incurably defective as it contained hearsay evidence in the nature of a newspaper article. The same affidavit also failed to disclose the source of information the deponent relied on and also did not distinguish paragraphs based on belief and those based on personal knowledge. The affidavit was also argumentative.

185 Relying on ***Supreme Court Civil Appeal No.1 of 1997: Attorney General V Major General David Tinyefunza***, and ***Constitutional Petition No.3 of 1999: Paulo Ssemogerere & Another vs Attorney General***; and also ***Order 19 Rule 3 of the Civil Procedure Rules***, the respondents submitted that the whole petition was incompetent by reason of the defective supporting affidavit of the 2<sup>nd</sup> petitioner.

***Issue No.2.***

190 The respondents' submission was that, in as far as the petition sought orders and declarations, including those for cancelling leases and certificates of titles belonging to third parties, who were not parties to the petition, then the same was incompetent. It ought to be struck out.

***Issue No.3:***

195 The respondents' stand was that the respondents' acts as regards the suit lands, did not breach the petitioner's right to practice, manifest, enjoy, profess, maintain and promote their religion and as such they were not inconsistent with Article 37 of the Constitution.

200 The respondents, as owners of the suit lands, maintained that they had no legal obligation to take into account the interests of the petitioners while dealing with third parties regarding the suit lands. There was no application to acquire the suit lands by the

petitioners to the second respondent. The petitioners were not lawful or bonafide occupants of the suit lands, to be entitled for protection under the provisions of sections 29 and 39 of the Land Act, Cap. 227. The petitioners enjoyed no easements in the suit lands. The All Saints Cathedral parish was freely accessible and operated normally, 205 in spite of the allocation of the suit land, to third parties. Therefore, the petitioners' fundamental right to practice their religion had not been contravened.

***Issue No.4:***

The respondents denied that the suit lands were allocated or leased out to third parties, and not the Church of Uganda, on the basis of religion or other discriminatory grounds. 210 The petitioners never applied to acquire any of the suit lands from the second respondent, the statutory body mandated to deal with such application.

According to the respondents, the petitioners were not entitled to the prayers sought and the petition ought to be dismissed.

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***Determination of the issues:***

This court, in interpreting the Constitution, is guided by the principle that all the provisions of the Constitution must be looked at and be considered together, each one supporting the other, so as to give effect to the purpose of the Constitution: See: ***South 220 Dakota vs North Carolina 192 US 268 (1940).***

Further, it is the duty of this court, as the Constitutional Court of Uganda, to enforce the paramount commands of the Constitution. In doing so, this court, has to apply a generous and purposive construction of the provisions of the Constitution that give effect to, and 225 recognition of, fundamental rights and freedoms: See: ***Supreme Court of Uganda Constitutional Appeal No.1 of 1997: The Attorney General v Major General David Tinyefunza***: Judgment of Order, JSC(R.I.P) at page 37.

230 This petition, in the main, calls upon this court to determine whether or not, on the facts  
of the petition, there has been breach and inconsistency with regard to Articles 21(1) and  
(2), 29 (1) (c) and 37 of the Constitution.

235 Therefore, all the relevant Articles of the Constitution, whether expressly referred to or  
not, will be brought into focus, and given a generous and purposive interpretation in order  
to determine whether or not any breach or inconsistency has happened with regard to the  
stated Articles of the Constitution.

***Issue No.1:***

240 The law on admissibility of newspaper articles is now settled by the Supreme Court of  
Uganda in ***Constitutional Appeal No.1 of 1997: Attorney General V Major General  
David Tinyefunza***, (supra). Newspaper articles are inadmissible as being hearsay  
statements since they are reported statements of persons who are neither parties to, nor  
witnesses in the case. They are also not admissible under the res-gestae principle in  
terms of sections 6, 9 and 10 of the Evidence Act.

245 In the instant petition the newspaper report was introduced by paragraph 7 of the affidavit  
of the 2<sup>nd</sup> petitioner which stated:-

250 ***“That the Respondents allocated Mutineer Valley Park to a private developer referred  
to in the press as Amina ..... A copy of the Newspaper report regarding this  
matter is hereby attached and marked annexure “B”.***

We note that in paragraph 4 of the affidavit of Henry Oluka, the Senior State Attorney,  
filed in opposition to the petition, the fact that “Mutineer Valley Park” land was allocated  
by the respondents to a third party was confirmed as true. The said affidavit stated in its  
paragraph 4 that:

255 ***“4. That I also know that the allocation of land known as “Mutineer Valley Park” could not have contravened and did not contravene Articles 21 (1),(2), 29 (1) (c) and 37 of the Constitution as alleged by the petitioners”.***

260 The newspaper article named **“Amina”** as the allocatee of the said land. There was no express admission of this by the respondents.

In the circumstances, this court holds that, to the extent that it was admitted by the respondents that **“Mutineer Valley Park”** land was allocated to a third party, then that part of the newspaper article, is admissible evidence as a fact admitted by all the parties to the petition. The rest of what is contained in the newspaper report, “annexure B” to the affidavit of the second petitioner, is inadmissible as evidence. It is accordingly severed from the said affidavit.

The deponent of the affidavit in issue stated in its paragraph 33:

270 ***“That, all I have stated herein is true to the best of my knowledge and belief”.***

The respondents did not assert that the affidavit in question contained any falsehoods. On our part, we find the affidavit straightforward, understandable, and one that did not prejudice, in any way, the respondents in their defence to the petition. While it would have been more appropriate for the deponent to state which paragraphs of the affidavit were true to the best of her knowledge, and which ones were true to the best of her belief, we hold that the failure to do so was merely procedural and did not invalidate the affidavit. It is also our finding that the deponent was not argumentative in her affidavit. All that she did was to state why she believed that her constitutional rights and those of other petitioners had been violated.

280 Article 126 (2) (e) of the Constitution requires us to administer substantive justice without undue regard to technicalities. We thus hold, in accordance with the dictates of

substantive justice, that the affidavit in issue was and is not incurably defective by reason of being argumentative and not distinguishing paragraphs based on belief and those based on personal knowledge. Subject to severing that part of it which we have held to be inadmissible evidence, we answer the first issue to the effect that the affidavit of Allen Elwana Okiror was and is, proper in law and, therefore, ought not to be struck out.

***Issue No.2:***

This issue requires us to resolve whether or not, the petition was incompetent by reason of the fact that the reliefs sought by the petitioners also affect third parties who are not parties to the petition. The third parties referred to are the allocatees of the respective suit lands. It is a fact that these allocatees were not made parties to the petition. They were therefore not heard in this petition.

The right to be heard is a fundamental basic right. It is one of the cornerstones of the whole concept of a fair and impartial trial. The principle of “**Hear the other side**” or in Latin: “**Audi Alteram Partem**” is fundamental and far reaching. It encompasses every aspect of fair procedure and the whole area of the due process of the law. It is as old as creation itself, for even in the Garden of Eden, the Lord first afforded a hearing to Adam and Eve, as to why they had eaten the forbidden fruit, before he pronounced them guilty: **See R V University of Cambridge [1723] 1 Str. 557 (Fortescue J.)** This principle is now of universal application. Article 10 of the Universal Declaration of Human Rights, 1948, Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, 1950, and section 2 (2) of the Canadian Bill of Rights, as well as Article 7 (1) (c) of the African Charter on Human and Peoples’ Rights, all provide for this right.

In Uganda, the traditional saying, that one ought not to decide a dispute between a boy and a girl without first having heard the case of each side, goes to show that even our forefathers in Uganda also embraced and practiced this universal principle of justice. The principle is currently constitutionally provided for in Uganda by Article 28 (1) of the Constitution. This Article provides that in the determination of civil rights and

obligations, or any criminal charge, one is entitled to a fair, speedy and public hearing before an adjudicating body established by law. This right is so fundamental that Article 44 of the Constitution prohibits any derogation from its enjoyment.

The concept of a fair and impartial trial involves a hearing by an impartial and disinterested tribunal. This tribunal affords to the parties before it, a hearing before it condemns, proceeds upon inquiry and results in judgment, only after consideration of evidence and facts as a whole. Fair hearing involves the right to present evidence, to cross-examine and to have findings supported by evidence: See: ***Black's Law Dictionary (6<sup>th</sup> Edition)*** and also ***Supreme Court of Uganda Election petition No.04 of 2009: Bakaluba Peter Mukasa v Nambooze Betty Bakireke***, (Judgment of Katureebe, JSC).

We note that some of the reliefs sought by the respondents in the petition are in the nature of declarations that a number of acts allegedly carried out by the respondents with regard to the suit lands were discriminatory and/or breached the petitioners' rights to belong, practice, and manifest their religion, thus being inconsistent with Articles 21 (1), and (2), 29 (1) (c) and 37 of the Constitution.

To the extent that the declarations sought are as between the petitioners and the respondents, and do not affect the rights of any third parties, who are not parties to the petition, we find and hold, that the petition is proper in law and properly before this court.

However, there are also reliefs prayed for in the petition whereby this court is asked to make orders cancelling the leases and certificates that already have individual third parties as registered proprietors of the respective suit lands. The registered proprietors are not parties to this petition. In other words, the petitioners are seeking from us orders to disentitle these third parties of their respective interests in the suit lands, when such parties have not been heard. We are unable to do that, as to do so, would be to condemn

such third parties, without having availed to them a fair hearing, which act would be contrary to Article 28 of the Constitution.

345 We accordingly hold that the petition is only partly competent in as far as it seeks reliefs that are only as between the petitioners and the respondents, but is incompetent in respect of those reliefs, which, if granted, would affect the interests of third parties in the suit lands, yet those third parties are not parties to this petition.

***Issue No.3:***

350 In this issue we are to resolve, whether or not, the allocation and the fencing off of the suit lands, to the exclusion of the Church of Uganda, breached the petitioners' right to practice, manifest, enjoy, maintain and promote their religion; thus being inconsistent with Articles 29(1) (c) and 37 of the Constitution of Uganda.

355 The essence of the petitioners' complaint is whether the acts of the respondents as regards the suit lands violated the petitioners' right to freedom of religion.

360 Under Articles 29(1) (c) and 37 of the Constitution, every person has the right to freedom to practice any religion, and manifest such practice, which includes the right to belong to, and participate in the practices of any religious body or organization in a manner consistent with the Constitution. Every person has also the right to belong to, enjoy, practice, profess, maintain and promote any creed or religion in community with others.

The above Articles of the 1995 Uganda Constitution have their foundation from a number of International Instruments that preceded the Uganda Constitution.

365 The two Articles, are almost a replica of Article 18 of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights also in its Article 18 provides for freedom of thought, conscience and religion. This instrument however also provides that freedom to manifest one's religion or beliefs may be subject

370 to limitations as may be prescribed by law in order to protect public safety, order, health,  
morals or the fundamental rights and freedoms of others.

The African Charter on Human and People's Rights in its Article 8 provides that freedom  
of conscience, the profession and free practice of religion shall be guaranteed. No one  
375 may, subject to law and order, be submitted to measures restricting the exercise of the  
said freedoms.

Article 12 of the American Convention On Human Rights provides for everyone to have  
a right to freedom of conscience and of religion while the European Convention on  
380 human Rights also provides for similar rights.

Other international Instruments that guarantee the right to freedom of conscience and of  
religion are:-

Article 5 (d) (vii) of the International Convention on the Elimination of All Forms of  
385 Racial Discrimination; Article 14 of the Convention on the Rights of the Child; Article IX  
of the African Charter on the Rights and Welfare of the Child; and Article 4(1) of the  
Inter-American Convention on the Prevention, Punishment, and Eradication of Violence  
against Women.

390 On the basis of the above international Instruments, and the current norms, practices and  
values practiced by the international community of nations, it can now be safely asserted  
that international human rights law prohibits discrimination on the ground of religion.  
Therefore Articles 29(1) (c), 37 and other relevant national objectives and Articles of the  
Uganda Constitution are a reinstatement of the international human rights law position.

395 We observe that a careful analysis of Articles 29(1) (c) and 37 of the Constitution, as well  
as the other considered International Instruments providing for the freedom of conscience

400 and religion, shows that there is a distinction between the right to freedom of thought, conscience and religion, on the one hand, and the right to manifestation of religion and belief on the other.

405 Freedom of thought or conscience involves one thinking and holding to one's beliefs freely. This freedom cannot be subjected to coercion or compulsion. Freedom of thought and conscience is therefore an absolute right. See: *Human Rights in Europe: A study of the European Convention on Human Rights*: 3<sup>rd</sup> Ed., A.H Robertson and J.G. Merrills, 1993, Manchester University Press, p.145.

410 By way of contrast, the freedom to manifest one's religion or belief on the other hand, is not absolute. It is subject to such limitations that are necessary in the public interest, which limitations have to be prescribed by law and are necessary in a democratic society. For example, holding public services, processions and other manifestations of belief and displays, may be subjected to regulation. Limitations to protect public safety, order, health, morals and the rights and freedoms of others are therefore a necessity in a democratic society: The test of what is "necessary in a democratic society" is the  
415 ultimate safeguard against interference with the enjoyment of a person's fundamental freedoms, that cannot possibly be considered necessary in society that is pluralistic and tolerant. See: *European Court of Human Rights Case of KOKKINAKIS V GREECE: Judgment of 25 May 1993, Series A, No.260 – A.*

420 The petitioners have contended before us that the acts of the respondents breached their rights to enjoy, maintain and promote their religion. This is because although their All Saints Cathedral parish had expressly demonstrated an interest in the suit lands for development purposes, the respondents denied the Church's applications, thus depriving the Church of development options. Further, the suit lands had been allocated to third  
425 parties without the Church being involved in the process or being consulted. The fencing off of part of the suit lands near State House, that was being used by the Church for

parking and access, limited and curtailed the petitioners' rights to enjoy, practice, maintain and promote their religion.

430 The respondents denied all the above petitioners' assertions.

We have carefully considered the facts and the submissions as presented by the petitioners on one hand and the respondents on the other. We have also carefully applied the relevant law to the facts before us.

435 We are unable to find, on the evidence before us, that the petitioners' right to freedom of thought and conscience, whereby each petitioner was and is free to think and hold to his/her religious beliefs, which right is absolute, was in any way violated by the acts of any of the respondents. It has not been proved to us that any of the petitioners was prevented from freely thinking and/or holding to his/her religion by any of the acts of the  
440 respondents that are the subject of the complaints in this petition.

It however remains to be decided whether any acts of the respondents did, in any way, violate the petitioners' manifestation of religion and belief, including, but not limited to, enjoyment, practice, maintaining and promoting the petitioners' religion and beliefs.

445

The evidence before us is to the effect that the then Church of England trustees, first occupied the land where All Saints Cathedral is currently situate, in 1938. On 12.06.1957, a formal lease was executed between the Government of Uganda Protectorate and the Church of England Trustees, the predecessors in-title of the present  
450 trustees of the Church of Uganda. By virtue of this lease the Church of England Trustees became the registered owner as leaseholder under Crown Lease, No.35763, Leasehold Register Volume 165 Folio 7, of the land situate between plots 4 and 2 Kyaggwe and Stanley Roads respectively.

455 For the period from 1938 up to 2001, we have not been availed, by the petitioners, any documentary evidence whereby the church applied to the second respondent, or its predecessor in title, to acquire more of the neighbouring and/or adjoining lands, for the purpose of expansion of church activities or any other purpose.

460 The evidence availed to us by the petitioners is that on 22.08.2001, the Most Rev. Dr. Livingstone Mpalanyi-Nkoyoyo, then Archbishop of The Church of Uganda/Bishop of Kampala Diocese, addressed a letter to Hon. Henry Kajura, The Hon. Minister of Public service, renewing a request of the church, that had been verbally made to H.E. The President, to acquire the land comprised in plot 4, situate between plots 2 and 6, Lugard  
465 Road, Nakasero, Kampala. The letter was copied to H.E. The President. The letter is annexure "F" to the second petitioner's affidavit in support of the petition.

We received no explanation from the petitioners, or their counsel, as to why this letter was addressed to the Minister of Public Service, who had nothing to do with land matters.  
470 We also find it strange that the letter was merely copied, but not directly addressed to H.E. The President, when a request was being made to H.E. the President to assist the Church acquire the land. We also received no evidence that H.E. the President received the copy of the said letter. Indeed there was no evidence before us whether Hon. Henry Kajura, the Minister of Public Service, received this letter.

475 Section 46 of The Land Act, Cap. 227, establishes the Uganda Land Commission. This Commission, under section 49 holds and manages any land in Uganda which is vested in or acquired by the Government in accordance with the Constitution. Section 53 (c) empowers the Commission to sell, lease or otherwise deal with the land held by it.

480 This court received no evidence as to why the Church of Uganda did not formally apply for the land, the subject of the letter to the Hon. Minister of Public Service, or any other of the suit lands for that matter, through the set procedure for acquiring land from the

second respondent. Had this been done, the second respondent would have been under  
485 obligation to deal with the said church application under the law, and the church would  
have been entitled to challenge the second respondent, just in case, the application was  
handled contrary to the law and to the prejudice of the church.

It is our finding that the said letter annexure “F” to the affidavit of the second petitioner,  
490 does not amount to a legitimate application by the Church of Uganda to acquire any of  
the suit lands from any of the respondents. So too is the letter dated 02.05.06 also  
annexure “F” to second petitioner’s affidavit, written in respect of plot 4 Lugard Road by  
the All Saints Church provost, to the Minister of Water, Lands and Environment. Apart  
from being addressed to the Minister of Water, Lands and Environment, and not the  
495 Uganda Land Commission, the body that receives and entertains applications to acquire  
lands vested in it, the letter talks of interests of sitting tenants on the said plot 4 Lugard  
Road, and a group of people fencing off the said plot. The letter is, therefore, no  
legitimate application by the church to acquire the land comprised in plot 4 Lugard Road.

500 We accept the explanation contained in paragraph 7 of the affidavit of the chairman of  
the second respondent, Jehoash Mayanja – Nkanji, dated 13.11.07, that the petitioners,  
through the Church of Uganda or otherwise, have never applied, in accordance with the  
law, to acquire any of the suit lands neighbouring them.

505 Accordingly the petitioners have not shown that they had any legal or equitable interest in  
the suit lands. The Church of Uganda All Saints Cathedral parish just happened to be  
situate and occupying pieces of land to which the suit lands were adjoining.  
Neighbourhood to these lands, per se, without taking proper steps in law to apply for  
acquisition of any one of those lands, did not vest in the Church of Uganda, any  
510 enforceable rights in any of the suit lands.

515 The petitioners have not proved to our satisfaction that they were denied allocation of the  
suit lands, or that the said lands were allocated and leased out by the respondents to third  
parties, on the basis that denied the petitioners to belong to, enjoy, practice, profess,  
maintain and promote their religion.

We therefore find that the respondents' actions in allocating the suit lands to the various  
third parties were not inconsistent with articles 29 (1) (c) and 37 of the Constitution.

520 **4<sup>th</sup> issue:**

This is whether or not the allocation, change of user and grant of leases of any of the suit  
lands to third parties, other than the Church of Uganda, was discriminatory and therefore  
inconsistent with the provisions of Article 21 (1) and (2) of the Constitution of Uganda.

525 Article 21 (1) provides that all persons are equal before and under the law in all spheres  
of political, economic, social and cultural life and in every other respect, and enjoy equal  
protection of the law. Under Article 21 (2) a person shall not be discriminated against on  
the ground of sex, race, social or economic standing, political opinion or disability.

530 "Discriminate" for purposes of Article 21, and indeed for the whole constitution, is to  
give different treatment to different persons attributable only or mainly to their respective  
descriptions by sex, race, colour, ethnic origin, tribe, birth, or religion, social or economic  
standing, political opinion or disability: See Article 21 (3). Article 21 (4), allows  
535 discrimination to be done by Parliament for purposes of implementing policies and  
programmes for affirmative action in the social, economic, educational and other  
imbalances in society.

Article 21, like Articles 29 and 37 of the Constitution, has also its foundation in a number  
of international legal Instruments that preceded the 1995 Uganda Constitution. These

540 are: The Universal Declaration of Human Rights (Article 2 (1), The International  
Covenant on Civil and Political Rights (Article 18), The American convention of Human  
Rights, 1969, (Article 12), The European Convention on Human Rights (article 9) and  
The African Charter on Human and Peoples' Rights (Article 8).

545 On the basis of the above international instruments, as well as the case law on their  
interpretation, and taking the Uganda Constitution as a whole, the term "Discrimination"  
has come to imply a distinction, exclusion, restriction, or preference based on race,  
colour, sex, language, religion, political or other opinion, national or social origin,  
550 property, birth or other status, which has the purpose or effect of nullifying or impairing  
the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights  
and freedoms. See: **General Comment No.18 in United Nations Compilation of  
General Comments, p.135 para 7;**

and also

**European Court of Human Rights, Case of Cha'are Shalom Ve Tsedek V. France,**  
555 judgment of 27 June, 2000.

The prohibition against discriminatory conduct is based upon the universal principle of  
equality before the law. The human race as a family is characterized by the attribute of  
oneness in dignity and worthiness as human beings. Therefore, there ought not to be one  
560 group of human beings entitled to privileged treatment as regards enjoyment of basic  
rights and freedoms over others, because of perceived superiority. Likewise, no group of  
human beings should be taken as inferior and not entitled, and be treated with hostility, as  
regards enjoyment to the full of the fundamental rights and freedoms.

565 The right against discrimination is however not absolute. This is because, in the activities  
of human beings, not all differences in treatment are in themselves offensive to human  
dignity. Some inequalities in treatment of fellow human beings are necessary so as to

achieve justice or to offer protection to those in weak or vulnerable situations of life. This is the import of article 21 (4) of the Uganda Constitution.

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In the *Cha'ase Shalom Ve Tsedek V. France* case (supra), it was stated that discrimination is justified where it complies with the principle of legality of being prescribed by law to ensure public safety, order, health, morals, and fundamental rights and freedoms of others; or where it is necessary to achieve a concerned objective in the nature of affirmative action. Discrimination is also allowed where it is necessary in a democratic society. Discrimination ought not to be allowed if the same is being used as a propaganda for war or for national, racial or religious hatred.

The petitioners have submitted that the Church of Uganda was discriminated against on economic grounds by the respondents, when the suit lands were allocated to third parties, without giving an opportunity to the church to compete in acquiring the same. Yet the first respondent had actual or implied knowledge of the Church's interest in the said lands. Land was allocated in areas that had been indicated to the church as being unavailable for allocation, e.g. Mutineers Park, but the same land was later allocated to some other third parties. Also land that was being used by parishioners for parking purposes was fenced off, allegedly for security reasons, but subsequent allocations to other third parties showed that the excuse of "security reasons" had no truth in it. Lastly, the change of user of some of the suit lands, without taking into account the long standing rights and interests of the church, was discriminatory of the church.

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We have already found as a fact that the Church of Uganda never lodged, in accordance with the law, any application to be allocated any of the suit lands by the second respondent pursuant to the provisions of the Land Act, Cap. 227.

595

In our considered judgment, the mere fact that the suit lands were and still are, all in the neighbourhood of and/or adjoining the land owned by the Church of Uganda, where All

600 Saints Cathedral is situate, did not and does not per se, create an obligation on the part of the respondents to invite the church to participate, in the allocation of the said suit lands to third parties who legitimately applied to acquire those lands, while the Church never did so.

605 Given the position of the law as to discrimination, and the fact that the Church of Uganda took no legitimate steps to acquire interest in any of the suit lands, we find that, having considered the Constitution as a whole, the petitioners have not satisfied us that they were in any way discriminated against by the respondents in respect of any of the suit lands.

Therefore our answer to the fourth issue is that the allocation, change of user and grant of leases on the suit lands was not discriminatory and therefore not inconsistent with Article 21(1) and (2) of the Constitution.

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***Decision of the Court:***

The petitioners having been unsuccessful on all the issues framed, this court dismisses the petition.

615 ***Costs:***

620 Court has noted the fact that the petitioners instituted the petition for and on behalf of the parishioners of All Saints Cathedral parish, Nakasero, and not for their individual personal gain. The petition has also afforded an opportunity for consideration of important constitutional issues particularly as regards the fundamental rights and freedoms of equality and freedom from discrimination, protection of Freedom of Conscience and beliefs, freedom to practice and manifest one's religion as well as the Right to culture. We find that the petitioners, even though not successful, brought a worthy cause before us. They thus do not deserve to be condemned in costs. We accordingly make no order as to costs.

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Dated this ...**08<sup>th</sup>**....day of ...**August**.....2011.

A.E.N Mpagi Bahigeine

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**DEPUTY CHIEF JUSTICE**

C.K. Byamugisha

**JUSTICE OF APPEAL**

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S.B.K. Kavuma

**JUSTICE OF APPEAL**

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A.S. Nshimye

**JUSTICE OF APPEAL**

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Remmy Kasule

**JUSTICE OF APPEAL**